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N.J. SUPREME COURT YEAR IN REVIEW LEGAL ETHICS & MALPRACTICE

Getting Down to the Reason for the Rule

Court provides the missing link between *Wilson* and public confidence in the bar

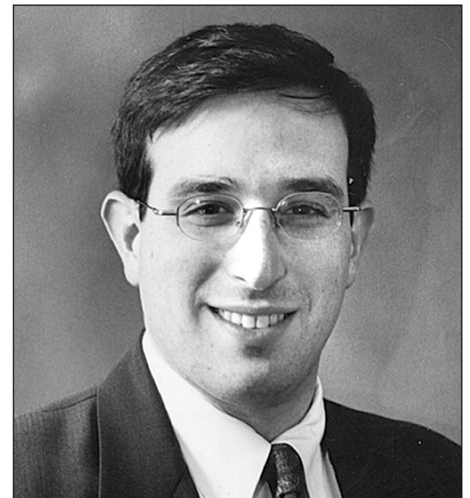
By Bennett J. Wasserman and Raphael M. Rosenblatt

We leave the just ended term having been clearly reminded in at least four cases of the New Jersey Supreme Court's unequivocal stance, first articulated in *In re Wilson*, 81 N.J. 451 (1979), that a lawyer's knowing misappropriation of funds from his or her attorney trust account will invariably result in disbarment. The Court's unflinching adherence to this rule — with its fatal impact on lawyers who wander into its cross hairs — is based on the need to preserve the confidence of the public in the integrity and trustworthiness of the legal profession.

What was unique about this past term is not the Court reaffirmation of *Wilson* but its recognition, at long last, that keeping the public's faith and trust requires not only disbarment of misappropriators but also compensation of their victims. In other words, shutting the courthouse doors on dishonest lawyers should not mean leaving their victims out in the cold.

This seemingly new sensitivity to giving victims better treatment from the legal system than they got from their errant lawyers is seen in *New Jersey Title Insurance Company v. Caputo et al*., 163 N.J. 143 (2000).

Caputo, which arises out of the disbarment proceedings in *In re Caputo* 135 N.J 106 (1994), is inextricably tied to attorney discipline because it revisits the issue of what compensatory remedies ought to be offered victims of attorneys' breaches of fiduciary duties, such as misappropriation of trust funds. See, e.g., *Baxt v. Liloia*,155 N.J. 190 (1998) where the Court held that a violation of the RPCs does not give rise to a cause of action against an adversary's attorney at least in cases where a breach of fiduciary duty is not at issue.



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Caputo was a solo practitioner, who did a substantial amount of real estate work. His involvement with New Jersey Title Insurance Company stemmed from several closings in which he had represented buyers and New Jersey Title insured the title being conveyed. Typically, Caputo received the proceeds of the mortgage loans from the buyer's lenders and deposited them into his attorney trust account. He was expected to use those funds to pay off the sellers' mortgages so that New Jersey Title could then insure that the buyer had clear title and the buyers' mortgage lenders a first lien.

Over a two-month period, Caputo withdrew $291,350 from his trust account that should have been used to pay off the mortgages. Instead, he wrote 52 checks totaling that amount payable to himself. He either cashed those checks at the branch of the bank where he maintained his attorney trust and business accounts or had them certified at that branch and then cashed them at a casino in Atlantic City. Caputo used the

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proceeds of those checks to fund his gambling forays.

New Jersey Title Insurance (NJTI) discovered that Caputo never paid off the mortgage liens which led it to conduct its own investigation into Caputo's embezzlement scheme. NJTI paid off the outstanding mortgages and then sued Caputo, realizing what frequently becomes painfully obvious to the victim of attorney embezzlement —that the attorney is either uninsured or not financially solvent. Therefore, NJTI joined as defendants the casino, where Caputo spent the money, and the bank in which he had maintained his trust and business accounts.

Ultimately, the case against the casino was dismissed by stipulation but the case against the bank proceeded on the theory that Caputo's misuse of his trust account funds should have raised the bank's suspicion that he was doing so in violation of his fiduciary duties thus triggering a duty on the part of the bank to put a stop to his embezzlement. For failing to act in this regard, the bank was alleged to be negligent and acted in bad faith in violation of the Uniform Fiduciary Law (UFL), N.J.S.A. 3B:14-55 et seq.

The trial court dismissed NJTI's claim against the bank on motion for summary judgment upholding a 1935 interpretation of "bad faith" under the predecessor statute of the Uniform Fiduciary Law that "gave lip service to the statutory bad faith standard, [that] made it almost impossible to establish bank liability in the absence of actual knowledge of fiduciary embezzlement." 163 N.J. at 153.

The Appellate Division affirmed the dismissal, but the Court reversed the Appellate Division and held "that bad faith denotes a reckless disregard or purposeful obliviousness of the known facts suggesting impropriety by the fiduciary. ... [W]here facts suggesting fiduciary misconduct are compelling and obvious, it is bad faith [for the bank] to remain passive and not inquire further because such inaction amounts to a deliberate desire to evade knowledge." Id. at 156.

Thus, the Court made a radical shift away from the old and impotent "bad faith standard" that was for so many years meaningless in terms of offering victims of attorney trust fund misappropriation the opportunity to sue for adequate compensation for their damages. Instead, the Court found a duty on the part of the bank in those circumstances that suggest a fiduciary's breach to act in some way to inquire as to whether the attorney/fiduciary's conduct was consistent with his fiduciary responsibilities. Whether the facts in *Caputo* should have raised the bank's suspicion as to how the attorney was utilizing his trust funds and whether the bank should have put a stop to such conduct, the Court held, were questions for a jury to decide. Those facts included: daily withdrawals from the trust account to himself totaling more than $291,000, the fact that the bank officers understood that these withdrawals were extraordinary and they knew that the attorney had regular dealings at a gambling casino; the bank was willing to close the attorney's business account for overdrafts but permitted the trust account, which held substantial client funds, to remain open. These facts and still others should have been enough to raise the suspicion of the bank and to trigger it to the need to act appropriately regarding the use of Caputo's trust account.

By reserving these questions of fact to the jury, the Court at least acknowledged that the time had come to concern itself as much with the plight of the victim of dishonest lawyers as it has with the importance of disbarring dishonest lawyers. Thus, NJTI now has a realistic chance of recouping its losses in paying off the mortgages that Caputo should have paid with funds deposited into his trust account.

The deeper significance of this case is that the Court seems ready to acknowledge that a remedy for the victim must accompany the discipline of the errant lawyer in order to maintain the integrity of the system and public's confidence in it that the *Wilson* rule has sought to achieve. Surely, *NJTI v. Caputo* individualizes the more global concern of maintaining the public's confidence in the integrity of the bar and offers those victims of attorney misappropriation the opportunity to be compensated for the lawyer's misdeeds.

Other *Wilson* Rule Cases

In *In re Mininsohn*, 162 N.J.62 (1999), the Office of Attorney Ethics (OAE) received notification of an overdraft from the bank where the attorney maintained his trust account. This triggered an audit of the attorney's books and records, which led to the attorney being charged with knowing misappropriation of trust funds and record-keeping violations. These charges arose from 15 separate real estate transactions in which the attorney withdrew his legal fees from escrow funds or other client funds before the closing and six other instances in which he disbursed funds to himself from his trust account when there were insufficient funds on deposit.

The *Mininsohn* decision focuses on the attorney's sloppy record-keeping and his practice of taking advances on legal fees before they were earned, even though the underlying contracts required him to retain those funds until closing. Notwithstanding his practice of doing so, the attorney acknowledged that he knew he was not entitled to take the fees until the transaction had closed. The attorney contended that he did not "knowingly" take his client's money, nor did he intend to steal from his clients.

Nevertheless, the Court invoked the *Wilson* rule, framing the issue as "whether the attorney knowingly or negligently invaded client funds." Id. at 72. "Misappropriation that results in disbarment consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking." Id. Although the attorney contended that he did not intend to steal from his clients, the Court held that even in this case "intent to steal is not required to establish knowing misappropriation. Respondent was fully aware that he was disbursing fees to himself before he had fully earned them." Id. at 74.

The *Mininsohn* case leads us to reexamine whether the rationale underlying the *Wilson* rule, i.e., preserving the confidence of the public in the bar, is apropos here. While the attorney in *Mininsohn* took his fees too soon, he still would eventually have been entitled to them. Also, even though he technically took client money prematurely without their authorization, they did not complain even though they were fully aware of it. Does that mean that it was of no significance to them? And if that is true, in what way were they victimized by a dishonest lawyer? In what way was their confidence in the bar diminished?

At least on its facts, *Mininsohn* does not seem to fit the *Wilson* mold. A better fit is *In re Tonzola*, 162 N.J. 296 (2000). Tonzola was retained to represent a client in an expungement matter. In responding to the client's inquiry about the status of his case, the attorney falsely represented that the Court granted his application for expungement and that he was awaiting the Court's order to that effect. The attorney then "cut and pasted" a Superior Court judge's signature from an order in an entirely different case onto a bogus expungement order that he had fabricated. The attorney then gave this phony order with the judge's forged signature to the client.

Investigation into the case revealed that the attorney had previously engaged in a similar ruse and forged a different Superior Court judge's signature in yet another instance. In addition to these two forgeries, the attorney took a different client's money that was supposed to have been used to purchase real estate and converted those funds for his own purposes.

The attorney was charged by the Essex County prosecutor with forgery and theft by unlawful taking, to which he pled guilty. He was given a year probation, was required to reimburse the Lawyers' Fund for Client Protection $27,000 and had to write letters of apology to the judges whose signatures he had forged. The Court "emphasize[d] that this matter involves not only the crime of misappropriation, but also of forgery... . Not only do such acts perpetrate a fraud against the client, they touch on, indeed corrupt, the judicial process." Id. at 308.

And, in such a case, the Court had no difficulty disbarring the attorney and invoking the rationale underlying *Wilson*: "Maintenance of public confidence in the Court and in the bar as a whole requires the strictest discipline in misappropriation cases. That confidence is so important that mitigating factors will rarely override the requirement of disbarment. If public confidence is destroyed, the bench and bar will be crippled institutions." Id. at 308.

The Lawyer's Uphill Battle To Prove Mitigating Factors

Approximately half the Court's decisions in the ethics arena dealt with an analysis of mitigating factors in disbarment actions for fraud, criminal offenses and fraudulent loan paperwork.

In one case, *In re Alum*, 162 N.J. 313 (2000), the Court found there were mitigating factors and voted against disbarment. In two cases, *In re Pena, Rocca and Ahl*, 2000 WL 668942, decided May 12, and *In re Tonzola*, 162 N.J. 296, (2000), the Court considered, but rejected the mitigating factors presented and voted to disbar the respondents (except for Ahl who was suspended for three years because of his more limited role in the activity described). Finally, in *In re Boylan*, 162 N.J. 289 (2000), the Court would not even consider any mitigating factors, given Boylan's egregious conduct, voting to disbar him without even entertaining any defenses he may have offered.

Alum discusses the respondent attorney's role in creating "silent seconds." These are fictitious credits involving the borrower failing to disclose to his or her first mortgage holder the need for secondary financing, yet obtaining such financing anyway. These fake credits can often jeopardize the lender's collateral by allowing for 100 percent financing and even, occasionally, providing the borrower with excess funds.

The Court explained that typically, in cases of such dishonesty, particularly falsifying public or lending documents, suspension, at a minimum, is appropriate. The respondent, Alum, presented mitigating evidence that he has, since these transactions, not had any ethical violations, and he has served underprivileged communities and has performed substantial pro bono work. In addition, the transactions occurred more than ten years before the commencement of the disciplinary proceeding and the respondent had no intervening violations. The Court found these arguments compelling and placed the respondent on probation for the period during which he would have otherwise been suspended: one year.

Tonzola, discussed in greater detail earlier in this article, presented the Court with the question of whether an attorney's mental illness would mitigate actions that would otherwise be grounds for disbarment. The respondent attorney, it will be recalled, on two separate occasions, forged the signatures of Superior Court Judges to a bogus Order. He also stole a firm retainer check and used it for his own personal needs. Tonzola pleaded guilty to one count of forgery and one count of theft — actions that the Court considered "all but certain" for disbarment.

Evaluating the reports of two separate psychiatrists, one submitted by the respondent, one by the OAE — confirming the respondent's bipolar disorder and manic depression — the Court used the standard established in *In re Jacob,* 95 N.J.132 (1984), to determine whether or not the respondent had proven that he "suffered a loss of competency, comprehension or will of a magnitude that could excuse egregious misconduct that was clearly knowing, volitional and purposeful." Id. at 137.

Using this exacting standard, the Court then held that when evaluating the entire record, including the conflicting findings of the medical experts and prior cases in which attorneys alleging some mental defect and still failed to satisfy the *Jacob* standard, disbarment is the appropriate sanction. The Court pronounced that "mitigating factors will rarely override the requirements of dis-

barment." "We cannot conclude'" said the Court, "that respondent's mental condition influenced or motivated his criminal conduct to the point of excusing it." 162 N.J. at 308.

Writing separately, Justice Coleman advocated a bright-line rule in which "*Jacob* has no application when the disciplinary proceedings are based on a judgment of conviction for theft of client or law firm funds." He feels the Court should not even have considered mitigating factors because of the respondent's prior guilty plea thereby acting as presumptive evidence of the offenses charged.

It is worthwhile noting that none of the mitigating defenses offered by the attorneys in their disciplinary actions were sufficient to prevent their disbarment, even in cases in which the attorney had not committed criminal or fraudulent acts. As indicated in *Tonzola*, manic depression did not stave off disbarment.

In *In re Kelly* 164 N.J. 173, decided June 16, the respondent attorney suffered from alcoholism and depression and confessed to being "overwhelmed by his bookkeeping responsibilities." The respondent in *In re Wright*, 163 N.J. 133, suffered from a blinding love for his bookkeeper who mismanaged his attorney's trust account.

The Court in each these cases held that disbarment was appropriate. Even though the Court "does not disbar lawyers who are bad bookkeepers," it does disbar lawyers almost invariably when there is a knowing misappropriation of clients' funds. 163 N.J. at 136.

In fact, Coleman's separate opinion in *Tonzola* seems to illustrate how the Court examines mitigating evidence generally, and mental defect defenses specifically. In light of *Jacob* and other cases in which an attorney introduced his diminished mental capacity as a mitigating factor in an effort to be spared from inevitable disbarment when misappropriating client funds, the Court seems to require an almost "M'Naghten type" diminished capacity standard" in which the respondent attorney did not know "the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing was wrong. N.J.S.A. 2C:4-1." 162 N.J. 312 n.1. Such a rigorous standard helps explain why the Court is most disinclined to consider mitigating evidence as it relates to an attorney convicted of a criminal offense.

The Court would not even consider mitigating factors in *In re Boyla*n, 162 N.J. 289 (2000) because his actions were so egregious. Boylan served as a municipal court judge in Jersey City. He pleaded guilty to one count of federal mail fraud for his role in defrauding Jersey City. As a judge, Boylan would reduce traffic fines and penalties for female defendants, coach these women to lie in court and solicit sexual favors in return. That Jersey City lost more than $10,000 in fines and penalties pales by comparison to the damage such misconduct does to our legal system.

The Court concluded that "certain types of ethical violations are, by their very nature, so patently offensive to the elementary standards of a lawyer's professional duty that they per se warrant disbarment." The respondent's role in suborning perjury, witness tampering, and sexual misconduct while acting as a judge, "corrupts the judicial process or evidences a lack of the character and integrity that are necessary in an attorney." 162 N.J. 293. The Court rejected even considering any mitigating evidence by concluding that the violation in this matter is "so deep and so profound," that a remand would serve no purpose and disbarment is the only appropriate sanction. Id. at 294.

Consequences of Conspiring With Clients

In the *Rocca*, *Pena* and *Ahl* cases, we see a vignette of what happens when lawyers conspire with their clients to accomplish unlawful ends by dishonest means. Attorneys Rocca, Pena and Ahl agreed to co-own a bar with Gus Santorella, a convicted felon. Santorella and his girlfriend were to manage the establishment. Because Santorella was not permitted to have an ownership interest in an establishment that held a liquor license, the attorneys set up a sham transaction trying to conceal Santorella's involvement and misrepresented this to the ABC and the police when they investigated the true ownership. As the relationship soured between the parties, they commenced a civil suit but the trial court found the contract between them to be invalid and an attempt to evade the alcoholic beverage control laws.

The Supreme Court concluded that the attorney's purpose was to evade N.J.S.A. 33:1-25 and thereby perpetrate a fraud on the state of New Jersey in violation of RPC 8.4(d) (conduct prejudicial to the administration of justice). Though the attorneys were not charged with perjury, the Court considered their lying during the civil trial as an aggravating factor at the disbarment proceeding. Rocca and Pena had been reprimanded in the past for RPC violations, and the Court found that they were more directly involved in the unlawful business arrangement with Santorella than Ahl.

Because of these aggravating factors, the appropriate sanction for Rocca and Pena was disbarment. Ahl's involvement was marginal in relation to the other two lawyers and he was suspended for three years.

Justice O'Hern wrote separately to question the Court's differentiation between the three attorneys. As none of them were ever charged with a criminal offense (such as perjury for their testimony in the civil action), O'Hern found no valid reason to distinguish between them and concluded that disbarment is appropriate only in instances in which the attorney is deemed beyond rehabilitation. None of the attorneys here manifested any reason to believe they could not be rehabilitated. Perceiving no real difference between their respective acts of misconduct, O'Hern voted to suspend all of them equally.

Conflict of Interest

The Court dealt with one case in the context of conflicts of interest. *In re Advisory Committee on Professional Ethics*, No. 18-98, 162 N.J. 497 (2000), presented the question of whether an

attorney can serve as both a municipal attorney and a municipal clerk-administrator.

The borough attorney represents the town in all "judicial and administrative proceedings in which the municipality or any of its officers or agencies may be a party or have an interest." 162 N.J. at 500.The clerk-administrator (a dual position intended to be filled by the same person) essentially acts as the recorder of any town meeting minutes or other required records such as real estate purchases or sales, acts as surety bonds administrator, and acts as a "liaison between the governing body and the various departments, bodies and other officials of the Borough." 162 N.J. at 499.

The Court found that the positions could not be held by same person, but did so not because of the logical "appearance of impropriety" reasoning, finding that the "Legislature expressly held the two offices to be compatible." 162 N.J. at 501. The standard test for an "appearance of impropriety" analysis is whether an "ordinary knowledgeable citizen acquainted with the facts would conclude that the multiple representation poses substantial risk of disservice either to the public interest, or the interest of one of the clients." RPC 1.7(c).

Nor did the Court find that the positions of attorney and clerk-administrator were incompatible, which is usually understood to mean, "a conflict or inconsistency in the functions of the office." 162 N.J. 502.

Instead, the Court found an actual conflict in the double-duty of town attorney and clerk-administrator. Because the clerk-administrator will take actions on behalf of the borough or town, that person will often require advice as to the legality of some actions taken. The town itself is seeking counsel when the municipal administrator seeks legal advice. The Court determined that "[a]n attorney cannot reasonably be expected to give that body candid, objective advice concerning his own conduct as administrator. And unlike a typical corporation, a municipality cannot waive any potential conflict of interest." See, e.g., RPC 1.7(a)(2), *Opinion 415*. Therefore, the Court found that the two positions could not be held by the same individual.

Justice Stein's dissent seems to bring a more practical approach to the issue. He explains that it is extremely unlikely that an attorney would be willing to risk his legal career for the sake of his job as a town administrator. Instead, he reasoned, there is a "greater likelihood that the strong identity of interests between the positions of attorney and administrator, focused on serving the municipality's best interests," would protect the attorney from jeopardizing his legal career. 162 N.J. at 506.

More important for Justice Stein, no hearing was ever conducted to determine whether or not acting as clerk-administrator would affect the attorney's ability to perform his job to the fullest. In fact, oral arguments in the matter illustrated no instances in 10 years in which an "administrator's own interests were antagonistic to those of the Borough." 162 at 508.

Because both the town attorney and the clerk-administrator act in the best interests of the municipality, and because of the Legislature's seeming willingness to allow both positions to be filled by the same person, Justice Stein dissents and holds that one individual can hold both jobs at once.

All told, the most important development in the just concluded term of the Court is an acknowledgment that there is more to the task of building and maintaining public confidence in the integrity of the legal profession and system than simply disbarring dishonest lawyers. The Court's knee jerk response of disbarment in cases where lawyers misappropriate trust account funds has matured to an important level. The Court may well have demonstrated that an essential element of building public confidence is coupling lawyer discipline with permitting victim compensation through the civil litigation process.

To achieve the full measure of public confidence in the legal system that *Wilson* has sought to achieve since 1979, it appears that the Court has in this past term concluded, as did the songwriter many years ago, that you can't have one without the other. ■